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In The

Supreme Court of the United States

October Term, 1975

1975 No. 72, Original

STATE OF SOUTH DAKOTA,
Plaintiff,

vs.

STATE OF NEBRASKA
Defendant,

AND

ROBERT J. FOLEY, et al.,
Petitioners for Leave to Intervene.

INTERVENOR'S RESPONSE TO PLAINTIFF'S EXCEPTION TO SPECIAL MASTER'S REPORT

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ARGUMENT

Plaintiff's Exception to the Special Master's Report Should Be Overruled

This case is an exception to the rule that a private litigant will not be permitted to intervene in an action over a boundary dispute between two states when the state of the litigant is already a party. Here the interests of plaintiff and intervenor conflict. They are not the same or even similar. Intervenors claim title to and ownership of the island. They and their predecessors have paid taxes on it to Nebraska since 1865. The Attorney General of the State of South Dakota, in 1965 in an official opinion to the Director of Taxation of Yankton

County, South Dakota, said South Dakota had no taxable interest in the island because it was not in South Dakota but was in Nebraska.

The cases cited by plaintiff follow the rule established by this court in *Kentucky v. Indiana*, 281 U. S. 163, 74 Law. Ed. 784 at 797, where the court said:

> "An individual citizen may be made a party where relief is properly sought against him, and in such case he should have suitable opportunity to show the nature of his interest and why the relief asked against him individually should not be granted. * * *
>
> "This gives an individual defendant in such a suit between states full opportunity to litigate the only question which concerns them individually as distinguished from the questions which concern him only in common with all the citizens of his state."

The court further said:

> "A state suing, or sued, in this court, by virtue of the original jurisdiction over controversies between states must be deemed to represent all its citizens. * * * Citizens, voters and taxpayers, *merely* as such, of either state, without a showing of any further and proper interest have no separate individual right to contest in such a suit the position taken by the state itself."

Petitioners seek to intervene, not because they are *merely* citizens, voters or taxpayers in South Dakota, in this action, but because they have a further and proper interest, in Rush Island, and in consequence an individual right to contest the claims of South Dakota in the pending boundary dispute. The Special Master pointed out, "The record discloses that there is a probable conflict between the intervenors and the State of South Dakota as to the ownership of the property. It is claimed and with good reason that should South Dakota prevail and it be

determined that the Island is located within the State of South Dakota, the state, by its appropriate agency, would claim title to the lands against the Movants." * * * "The intervenors' claims and defenses as to the major questions of law or fact, are in common with those asserted by the defendant." The case of *Rhode Island v. Massachusetts*, 37 U. S. 657, 9 Law. Ed. 1270 pointed out that *merely* because the people inhabiting the disputed area were not made parties did not make void the order of the court.

In *New Jersey v. New York*, 345 U. S. 369, 97 Law. Ed. 1081, the court said an intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens of the state which interest is not properly represented by the state. Here intervenors have met that burden as pointed out by the Special Master. The interests of South Dakota and intervenors are in direct conflict and are substantial. *United States of America v. Nevada, et al.*, 412 U. S. 534, 37 Law. Ed. 2d 132 does not seem to reach the question which is raised here.

In *Utah v. United States*, 394 U. S. 89, 22 Law. Ed. 2d 99 the court said a stipulation entered into between the United States and Utah so limited the issues before the court that the presence of Morton (the private individual) and similar property owners is neither necessary nor appropriate. Morton's motion was denied because of the circumstances set out in the stipulation. *But for the stipulation Morton's right to intervene would have had a substantial basis.*

The court further said it declined to permit intervention for the sole purpose of permitting a private party

to introduce new issues which have not been raised by the sovereign directly concerned. Here intervenors seek to introduce no new issues; but seek only to join the State of Nebraska in supporting the claim that Rush Island is and always has been a part of the State of Nebraska.

Plaintiff's claim that intervenors have no interest in the proceeding, that the outcome will not directly affect their title because it is derived from a federal patent. But unless Rush Island is in South Dakota (on the South Dakota side of the main channel of the Missouri River) plaintiff has no claim or interest to the island under SDCL 1967, 5-2-4, and the outcome of this case is, in consequence, of vital interest to intervenors and is diametrically opposed to the interests of South Dakota.

CONCLUSION

As was pointed out by the Special Master, the interest of South Dakota and the intervenors here is not the same, but in direct conflict. As this court pointed out in *Kentucky v. Indiana,* supra, an individual citizen may be made a party where relief is properly sought against him and in such case he should have suitable opportunity to show the nature of his interest. Plaintiff's exceptions to the Special Master's report should be overruled.

Dated at Vermillion, South Dakota, this 1st day of August, 1977.

Respectfully submitted,

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